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No. 00-180

IN THE
SUPREME COURT OF THE UNITED STATES

Edwin Burilovich and Linda Burilovich
as next friends on behalf of their son,
Bradley Burilovich,
Petitioners,

v.

Board of Education of the Lincoln Consolidated Schools
and Ronald Greiner, individually,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF IN REPLY

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14 pp

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Introduction 1

Rebuttal to Respondents' Counter-Statement of the case 2

Rebuttal to Respondents' Reasons for Denying the Writ 4

I The Sixth Circuit's rule of deference to the findings of the SHO is in conflict with established rules in other circuits, and as applied in this case, the rule is arbitrary and leads to an unjust result 4

II There is a clear split among the circuits regarding the allocation of the burden of persuasion in an IDEA case, and as in this case, it is a critical issue 8

Conclusion 10

TABLE OF AUTHORITIES

Cases:

Board of Educ. v. Rowley,
458 U.S. 176 (1982) 1

Doyle v. Arlington County Sch. Bd.,
953 F.2d 100 (4th Cir. 1991) 8

Metropolitan Nashville & Davidson County Schl. System v. Guest, 900 F. Supp 905
(M.D. Tenn. 1995) 3

Renner v. Board of Educ.,
185 F.3d 635 (6th Cir. 1999) 6

Statutes:

Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* (1994):
20 U.S.C. 1408 1
20 U.S.C. 1415 1

Michigan Education Code:
M.C.L. 380 1701(a) 10
M.C.L. 380.1711(1) 10
M.C.L. 380.1751(1) 10

Miscellaneous:

Michigan Administrative Code R. 340.1711(a) 3
Michigan Administrative Code R. 340.1758 3

INTRODUCTION

Petitioners have requested that the Court grant a writ of certiorari to resolve a split among the circuits regarding the standard of deference to be afforded by the courts to each level of administrative review in a case brought under the Individuals with Disabilities Education Act, 20 USC §1408 *et seq.* ("IDEA"), and that the Court determine whether summary judgment is appropriate based on deference to an administrative hearing officer's findings where there were material facts in dispute before that officer and before the reviewing court. Petitioners also request that the Court review the question of which party should bear the burden of persuasion at each stage of an IDEA dispute. This Court has not addressed the issue of standards of review and burdens of persuasion under the IDEA since *Board of Educ. v. Rowley*, 458 U.S. 176 (1982), and given the divergent approaches that have since developed within the circuits, these issues are ripe for review.

The Court's guidance on these questions is essential because the courts have developed conflicting rules and are issuing inconsistent decisions. The Sixth Circuit has adopted a rule of deference to the findings of the officer who conducts the final level of administrative review, usually a State Hearing Officer ("SHO"). The rule of deference applies even where the SHO's findings directly conflict with the findings and decisions of the Local Hearing Officer ("LHO") who actually conducted the evidentiary hearing prescribed by 20 U.S.C. §1415. This rule of deference has the effect, as in this case, of allowing the SHO to determine the existence and appropriateness of an Individualized Education Program ("IEP"), without holding a hearing and regardless of the existence of any disputed issues of fact. This rule is directly in conflict with the rules adopted by the Third, Fourth,

Eighth, and Tenth circuits that provide for at least some measure of deference to the findings of the officer who conducts the hearing. Pet. at pp. 12-14.

There is also a split among the circuits regarding which party is properly allocated the burden of persuasion in the various stages of an IDEA dispute. The Sixth Circuit has taken the position that the party challenging the IEP (usually the parents of the disabled student) must bear the burden at all stages of administrative and judicial review. This rule is directly in conflict with the rules of four other circuits, which place the burden (at least at some stage of the proceedings) on the school district to justify the appropriateness of the proposed IEP.

It is essential that the Court provide guidance to the courts below on these topics. The facts of this case make clear that the approach adopted by the Sixth Circuit can lead to an unjust result.

REBUTTAL TO RESPONDENTS' COUNTER-STATEMENT OF THE CASE

Respondents' Brief In Opposition (hereinafter, "Opp.") mischaracterizes and misrepresents material aspects of the record in this case. A few brief comments are necessary in order to clarify the record.

Respondents are simply incorrect in their statement that the December, 1995 IEP meeting was the "first time" that the Petitioners requested that the District include Discrete Trial Training (DTT) in their autistic son's educational program. Opp. at p. 2. The record is clear that over one year earlier, at the October 5, 1994 IEPC meeting, Petitioners

requested that the District provide DTT as a part of BJ's IEP. Petitioner's request was denied. App. at 42a.

Respondents also mischaracterize the ramifications of the District's lengthy delay in reclassifying BJ as autistic. First, the failure to reclassify a disabled student is a procedural violation of a student's rights under the IDEA. *See Metropolitan Nashville & Davidson County Schl. System v. Guest,* 900 F. Supp 905, 908 (M.D. Tenn. 1995). It is undisputed that the District was aware no later than June, 1994 that BJ had been diagnosed as autistic.[1] Thus, BJ no longer fit into the PPI classification which is defined as a child "whose primary impairment cannot be differentiated through existing criteria." Mich. Admin. Code R. 340.1711(1). Despite this knowledge, the District did not reclassify BJ as autistic until February 9, 1996.

Second, contrary to Respondents' assertion, it is clear that the District's nineteen-month delay in reclassifying BJ as autistic did in fact prevent BJ from receiving appropriate special education programs and services. Had BJ been appropriately reclassified by the time of the October 5, 1994 IEPC, the Committee would have considered as options the special programs and services available to children diagnosed as autistic, which are drastically different from the options available to PPI students. *See* Mich. Admin. Code R. 340.1758. These options would have included a special

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[1/] BJ's teacher, Suzanne Boyer, was present at a portion of BJ's February 24, 1994 appointment with Dr. Tsai. Dr. Burilovich hand-delivered to Ms. Boyer a copy of Dr. Tsai's evaluation and diagnosis. App. at 29. It is further undisputed that in June, 1994, Dr. Burilovich sent a letter to Willow Run District Superintendent Dr. Yomtoob relaying Dr. Tsai's diagnosis of BJ as autistic. App. at 39.

classroom for the autistically impaired, the services of a teacher certified to work with autistic children, or even integration into a mainstream preprimary program, such as a Head Start or another full-day preschool program. It will be recalled that the May 1996 IEP proposed by the District in fact removed BJ from a special education program and placed him in a mainstream classroom.

REBUTTAL TO RESPONDENTS' REASONS FOR DENYING THE WRIT

I

The Sixth Circuit's rule of deference to the findings of the SHO is in conflict with established rules in other circuits, and as applied in this case, the rule is arbitrary and leads to an unjust result.

The standard of review applied by the Sixth Circuit, and advocated here by Respondent, provides for deference to the "findings" of the hearing officer who conducted the final administrative review, which in Michigan is conducted by a SHO. Although Respondents attempt to draw a clear distinction between deference to the SHO's "decisions" and the SHO's "findings," this distinction was neither recognized nor applied by the courts below. In fact, the Sixth Circuit stated that "federal courts are generalists with no expertise in the educational needs of handicapped children and will benefit from the *factfinding* of a state agency, which is presumed to have expertise in the field." App. at 11a (emphasis added).

Further, the Sixth Circuit also held that "when there is a conflict between the holdings of the local and state

hearing officers, the court must defer to the state hearing officer's decision in reviewing the record on appeal." App. at 13a. This Court has never reviewed this standard, and this case illustrates the injustice that can result from its application.

Deference in this case resulted in the affirmation of the SHO's complete reversal of the LHO's hearing-based findings, including the LHO's determination of the credibility of Petitioners' expert witnesses. The LHO had found that Petitioners' expert witnesses, Dr. Patricia Meinhold and Dr. Peter Holmes, were "well qualified witnesses" who "gave strong testimony in support of DTT and a behavioral approach." App. at p. 248a.

Respondents argue that the SHO did not overturn the LHO's witness credibility findings, but rather, "the SHO reached an educational decision by weighing the expert testimony without making 'credibility' determinations on a 'cold' record." Opp. at p. 7. Respondents must torture the record to reach this absurd result. That the SHO clearly made a credibility determination with respect to both of the expert witnesses who testified in front of the LHO, Dr. Patricia Meinhold and Dr. Peter Holmes, is evidenced by the following excerpt:

> the SHRO discounts the testimony of both doctors (Meinhold and Holmes), ***finding them more motivated by a professional and/or personal agenda rather than having been derived from fact specific inquiries into what constitutes an IEP for BJ***.

App. at 98a (emphasis supplied). Making determinations about the "motivations" and "personal agenda" of a witness

cannot be characterized as anything other than an assessment of the witness's credibility. Additionally, the SHO went on to reject virtually all of the program features recommended by Dr. Meinhold and Dr. Holmes. App. at pp. 180a-188a.

In a footnote to their Brief, Respondents make the point (of dubious relevance) that Petitioner's counsel was also counsel for the parents in *Renner v. Ann Arbor Pub. Schls.*, 185 F.3d. 635 (6th Cir. 1999). Opp. at p. 14, fn. 3. Petitioners fail to mention the much more relevant point that SHO Sosnowsky and Dr. Meinhold were also involved in the *Renner* case. Moreover, they fail to alert this Court to the fact that in his decision in *Renner* SHO Sosnowsky made the following remarkably similar finding regarding Dr. Patricia Meinhold, again, without actually hearing her testimony:

> the SHRO discounts her views, ***finding them more motivated by a professional or personal agenda rather than having been derived from fact specific inquiries into what constitutes a FAPE for Martin***.

Plaintiff's May 11, 1998 Brief in Support of Motion for Reconsideration at p. 4 (emphasis supplied).

These statements not only illustrate the fact that SHO Sosnowsky has at least twice overruled an LHO's findings regarding the credibility of expert witnesses whose testimony he had never heard, but they also highlight the injustice that can occur when deference is given to the findings and decisions of a hearing officer who had no exposure to the witnesses, and who clearly had a pre-existing agenda of his own. The idiosyncratic style of this SHO is hardly surprising, given the process of selecting State Hearing Officers in Michigan.

In selecting SHOs, the Michigan Department of Education uses the criteria set forth by the Michigan Department of Management and Budget for the bidding of private contracts, which requires that "The Department [of Education] is directed to contact the lowest bidder first." Plaintiff's May 11, 1998 Brief in Support of Motion for Reconsideration at pp. 1-3. Here, William P. Sosnowsky was the low bidder, and he received the contract for the review of LHO Gottwald's decision in this case.

Given the fact that states enjoy great latitude in selecting SHOs, there is reason to give careful consideration to the level of deference to be accorded to the SHO's findings and decisions. The Sixth Circuit rule which defers to an SHO's findings over the findings of the LHO, who actually had the opportunity to observe the demeanor of the witnesses, makes no sense and is unfair especially when applied in the context of the Michigan SHO selection system.

Further, the district court's finding that there was no conflict between the SHO's and the LHO's findings, and the Sixth Circuit's statement that the SHO merely "discounted" but did not "discredit[]" the expert's opinions[2] are belied by this record. Their analysis is the direct result of each court's effort to adhere to an arbitrary rule of deference to the findings of an SHO under circumstances where the SHO and the LHO reach diametrically opposed conclusions.

Based on the standard of deference to the SHO, the district court inappropriately granted summary judgment where there were significant disputes of material facts not

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[2]/See Opp. at pp. 6-7.

only between the parties but also between the findings of the LHO and the SHO.

Contrary to Respondents' assertion, the legality of the Sixth Circuit rule of deference to the findings of the SHO was raised by Petitioners in both the District Court and the Sixth Circuit. App. at 13a fn 2, 27a, 49a. Respondents do not deny the existence of a circuit split on this issue, and the fact that the Fourth Circuit reached the exact opposite result in *Doyle v. Arlington County Schl. Bd.*, 953 F.2d 100 (4th Cir. 1991), a case factually analogous to this case, shows the extent of the division between the circuits on this issue.

II

There is a clear split among the circuits regarding the allocation of the burden of persuasion in an IDEA case, and as in this case, it is a critical issue.

Respondents also do not dispute the existence of a split among the circuits regarding which party should bear the burden of persuasion in the various stages of administrative and judicial review of disputes under IDEA. Instead, Respondents argue that because the case was decided below on summary judgment, the allocation of burdens is irrelevant. Opp. at p. 8. Given the Sixth Circuit's rule of deferring to the findings of SHOs, this statement could not be further from the truth.

At the administrative review level, the allocation of the burden of persuasion determines the question that the administrative hearing officer is charged to answer, and it is thus inextricably intertwined with the hearing officer's decisions and findings which are subsequently afforded

deference by the courts. It is the difference between the hearing officer inquiring as to whether the parents have proven that the IEP offered by the District is inappropriate, versus whether the District has proven that the IEP it offered is appropriate. These are extremely different inquiries, and different factual findings and legal analysis accordingly will be required.

The difference in the inquiries required by these different burdens is clear from the findings of the SHO in this case. Since the SHO placed the burden on the parents to prove that the District's proposed May 1996 program was inappropriate, the majority of the SHO's findings focused on reasons for rejecting the program advocated by the parents and on criticism of the evidence and testimony offered by the parents. App. at 170a-173a; 178a-184a. The SHO did very little to try to identify what type of program would help maximize BJ's educational potential.

It is ludicrous for Respondents to suggest that the SHO's conclusory recital that "the challenged IEP is both valid and appropriate" makes the burden of proof issue moot and therefore not open to review. Opp. at p. 10. The SHO made very few findings of fact regarding the basis for his assertion, mostly consisting of unsupported statements to the effect that the District's proposed plan met state regulatory standards. App. at 186a. The SHO also listed the services and goals included the plan without any discussion as to whether or how the proposed services would help BJ achieve the stated goals, or how the plan would help BJ "achieve his maximum potential." App. at 185a-87a.

On judicial appeal of the administrative findings, even if the district court resolves the case on summary judgment, the burden of persuasion is still crucial because, as stated in

the Petition, the standard for ruling on a motion for summary judgment necessarily implicates the substantive standard of proof that would apply at a trial on the merits. Pet. at p. 22. The Court of Appeals also underestimated the importance of the burdens below, as its own opinion plainly relies heavily on the assumption that it is petitioners' responsibility to identify the deficiencies in the program proposed by the District, rather than the District's task to establish that it has proposed an appropriate program. App. at 22a-24a.

Further, as stated in the Petition and as recognized by the Second, Third, Eighth and Ninth circuits, placing the burden of proof on the parents in an IDEA case is not appropriate and runs contrary to the purpose behind the statute. Pet. at pp. 18-21. This is especially true in a state like Michigan which imposes a higher substantive standard on Districts, placing the responsibility on the Districts to propose educational programs "designed to develop the maximum potential" of their resident disabled children. M.C.L. 380.1701(a), 380.1711(1), 380.1751(1) (App. at 277a-283a). Respondents belabor the point that the Sixth Circuit has rejected this argument but then fail to address the policy-based reasons for disregarding the Sixth Circuit's approach, which cannot be reconciled with the rules of other circuits.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition, Petitioners respectfully request that the petition for a writ of certiorari be granted.

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